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Excessive Fines

- **The Supreme Court strikes down the criminal forfeiture provision for currency reporting offenses; the forfeiture of the full amount of the unreported currency is unconstitutional if the money is not involved in the commission of another crime.**

- **The Supreme Court holds that the test for excessiveness under the Eighth Amendment for all criminal and punitive civil forfeitures is whether the forfeiture is "grossly disproportional" to the gravity of the underlying offense.**

In a 5-4 decision, the Supreme Court reaffirmed that the Excessive Fines Clause of the Eighth Amendment applies to all "punitive" forfeitures—which includes all criminal forfeitures and some civil forfeitures—and held for the first time that the test for unconstitutional excessiveness is whether the forfeiture is "grossly disproportional to the gravity of the . . . offense." The test is the same as the one that applies to other criminal penalties under the Cruel and Unusual Punishments Clause.

Applying this test to the criminal forfeiture of currency involved in a violation of the CMIR statute, 31 U.S.C. § 5316, the Court held that forfeiture of the full amount that the traveler failed to report on the required Customs form would be unconstitutional—at least where there was no showing that the currency was connected to another crime. The ruling is likely to apply to civil forfeitures based on violations of the same statutes, and to both civil and criminal forfeitures of currency involved in other currency reporting violations such as the CTR offenses in 31 U.S.C. § 5324.

Justice Thomas, joined by Stevens, Souter, Ginsberg, and Breyer, wrote the majority opinion. Justice Kennedy, joined by Rehnquist, O'Connor, and Scalia, filed a strongly-worded dissent.

The case arose in 1994 when Defendant Hosep Bajakajian attempted to travel from Los Angeles to Cyprus without revealing on the CMIR form that he had concealed more than $357,000 in U.S. currency in his luggage. Bajakajian was arrested and pled guilty to a violation of section 5316. At a bench trial on the criminal forfeiture count, *see* 18 U.S.C. § 982(a)(1), the district court found that all $357,000 was "involved in" the offense, but held that the forfeiture of more than $15,000 would be unconstitutionally excessive in violation of the Excessive Fines Clause.

On appeal, the Ninth Circuit applied a two-part test. The court said that for a forfeiture to be constitutional, the property must be an instrumentality of the offense and the forfeiture must not be grossly disproportional to the underlying offense. Because it held that the unreported currency in a CMIR case is not an instrumentality of the offense, the court held that all forfeitures in such cases are unconstitutional *per se*, at least where there was no showing that the currency was involved in the commission of another crime. The appellate court thus did not have occasion to determine if the forfeiture of the full amount was grossly disproportional to the offense. The Government filed a petition for *certiorari* to the Supreme Court, which affirmed the Ninth Circuit's ruling on other grounds.

The Supreme Court first had to determine if the forfeiture of the unreported currency in a section 5316 case was "punitive" within the meaning of the Court's previous Excessive Fines decisions in *Alexander v. United States*, 509 U.S. 544 (1993), and *Austin v. United States*, 509 U.S. 602 (1993). This was necessary because the Excessive Fines Clause only applies to punitive forfeitures. The court held that the forfeiture was punitive, and that therefore the Excessive Fines Clause applied.

The Excessive Fines Clause does not apply to traditional *in rem* forfeitures, the Court said, because such forfeitures "are not considered punishment against the individual for an offense." *See United States v. Ursery*, 518 U.S. 267 (1996). But the forfeiture in this case was not a traditional *in rem* forfeiture; it was a criminal forfeiture that was imposed "at the culmination of a criminal proceeding and require[d] conviction of an underlying felony." Unlike a civil forfeiture, the court said, criminal forfeiture "cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a section 5316 reporting violation."

> The forfeiture in this case does not bear any of the hallmarks of traditional civil *in rem* forfeitures. The [G]overnment has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners.

By placing so much emphasis on the distinction between criminal and civil forfeiture, the Court appeared to suggest that the outcome of the case might have been different if the Government had attempted to forfeit the unreported currency civilly (under section 5317) instead of criminally. In section 5317 cases, of course, there is no requirement of a conviction and indeed no innocent owner defense. In a series of footnotes, however, the Court appeared to dispel that notion.

Traditional *in rem* forfeitures are not considered punitive—and the Eighth Amendment does not apply to them—because such forfeitures involve instrumentalities of the crime and are purely remedial. But it does not follow that all civil forfeitures are

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purely remedial. As the Court held in *Austin*, some civil forfeiture statutes are at least partly punitive in nature. To those forfeitures, the Eighth Amendment applies.

The Government argued that the unreported currency in a CMIR case is an instrumentality of the crime, but the Court said that was not so. "The currency is merely the subject of the crime of failure to report," the Court said. "It is not the actual means by which the criminal act is committed." Thus, while the Excessive Fines Clause might not apply to some civil forfeitures—*i.e.*, those that involve instrumentalities and are purely remedial—it would apply to the civil forfeiture of unreported currency.

In any event, the Court held that it was unnecessary, in a criminal forfeiture case, to determine if the property was an instrumentality of the offense or not. *All* criminal forfeitures are punitive, the Court said. "It is therefore irrelevant whether respondent's currency is an instrumentality."

Having determined that the forfeiture of the unreported currency was punitive and that the Excessive Fines Clause therefore applied, the Court turned to the question it had left unresolved in *Alexander* and *Austin*: What is the test of excessiveness under the Eighth Amendment? The Court held that the Excessive Fines Clause should be governed by the same test that applies in other Eighth Amendment cases under the Cruel and Unusual Punishments Clause. That is, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the defendant's offense." This test, which the Court said would be applied by the district courts in forfeiture cases in the first instance and would be reviewed by the appellate courts *de novo*, is derived from the Supreme Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983).

Applying the *Solem* test to the facts in this case, the Court held that the full forfeiture of the unreported currency would be grossly disproportional to the gravity of the offense and would therefore violate the Eighth Amendment. Most important, the Court noted that: the offense in question was only a reporting offense; there was no showing that the property in question was involved in any other crime; and the defendant's conduct did not result in harm to anyone other than the Government. By implication, the Court thus suggested that if, in another case, there was a showing that the unreported currency was derived from, or was intended to be used to commit another crime, the result would be different. Whether the property was in fact related to another crime would be "highly relevant to the determination of the gravity of [the] offense," the Court said.

The dissent suggested that another relevant consideration was the fact that the defendant had concealed the currency in his luggage and repeatedly lied to Customs agents about its source. But the Court responded that neither the lies nor the suspicious circumstances had a bearing on the gravity of the offense because neither factor was an element of the offense or the calculation of the appropriate punishment. The essence of the crime, the Court said, was the willful failure to report and nothing more.

Because the full forfeiture of the unreported currency would be grossly disproportional to the underlying offense, the Ninth Circuit's judgment was affirmed. The Court was careful to note that it was not expressing any view as to whether the $15,000 forfeiture imposed by the district court was the only appropriate forfeiture. The forfeiture of a larger amount might not be unconstitutionally excessive, but that question, the Court said, was not before the Court. Conversely, the Court noted that, because Bajakajian did not cross appeal, the Court had no occasion to rule whether the district court had the authority to mitigate a forfeiture in order to avoid an Eighth Amendment violation. It is entirely possible, the Court suggested, that no forfeiture is possible at all until Congress amends the statute to permit forfeiture of less than the full amount. That question the Court left for another day. —*SDC*

United States v. Bajakajian, ___ S. Ct. ___, No. 96-1487, 1998 WL 323512 (June 22, 1998). Contact: AFMLS Assistant Chiefs Harry Harbin, CRM20 (hharbin), and Stef Cassella, CRM20(scassell).

Comment: The Court's holding might be summed up this way: The Eighth Amendment applies to all criminal forfeiture because all criminal forfeitures are punitive. It also applies to punitive civil forfeitures—*i.e.*, those that are not purely remedial. The civil forfeiture of the instrumentality of a crime might be considered purely remedial, but criminal forfeiture is *always* punitive. Thus, when forfeiting an instrumentality, the Government might well be better off with civil forfeiture than with criminal forfeiture.

But the civil versus criminal distinction will probably make no difference in a case involving unreported currency. The Court has said such property is not an instrumentality of the reporting offense, and its forfeiture therefore cannot be purely remedial. This does not mean that unreported currency cannot be forfeited civilly; it just means that the Eighth Amendment will apply. (Prosecutors remain free to argue, of course, that *Bajakajian* does not apply to civil forfeitures. The Court's statements regarding civil forfeiture are all *dicta*.)

When the Eighth Amendment applies—whether in a civil case or a criminal case—the test is the same. The forfeiture may not be grossly disproportional to the gravity of the underlying offense. Here, the forfeiture was grossly disproportional because the offense was only a reporting offense, there was no harm done to anyone other than the Government, and there was no connection between the property and any other crime.

Accordingly, it seems highly likely that forfeitures (whether civil or criminal) of unreported currency will have to be reduced to some fraction of the unreported amount, unless there is a showing that the property was involved in another offense. What that fraction might be is totally unclear and will have to be determined on a case-by-case basis. The Court expresses its intent to follow any congressional directive as to the amount of punishment that would be considered proper, but Congress has not spoken on this matter except to authorize the forfeiture of the full amount. It is likely, therefore, that Congress will be asked to enact new forfeiture statutes for currency reporting violations that permit the forfeiture of all or part of the unreported currency in specific circumstances. In the meantime, the Department of the Treasury and the Justice Department may decide to promulgate internal guidelines suggesting when the Government should seek the forfeiture of all of the currency involved in the violation—*e.g.*, when there is a connection to another crime—and when it should seek forfeiture of only part.

Of course, as noted, the Supreme Court left open the question whether mitigation of a forfeiture to avoid a constitutional violation is even proper. No doubt that will be among the first issues litigated as we attempt to apply *Bajakajian* to pending cases.

The impact of *Bajakajian* on other types of forfeitures—*i.e.*, proceeds, facilitating property like conveyances, and instrumentalities like firearms—will be the subject of much debate. The "grossly disproportional" standard that now applies in all criminal cases and in "punitive" civil cases may or may not turn out to be the same as the pure proportionality test previously adopted by the Fourth and Eleventh Circuits, *see United States v. Wild*, 47 F.3d 669 (4th Cir. 1995) (in criminal forfeitures, the court must balance value of the property against the gravity of the offense); *United States v. One Parcel Property Located at 427 and 429 South Hall Street*, 74 F.3d 1165 (11th Cir. 1996) (applying pure proportionality test to all forfeitures). Or it may turn out to be the same as the "hybrid" test adopted in most other circuits, *see United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995); *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995); *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995). But it seems evident that in cases involving "traditional forfeitures" of instrumentalities like firearms and smuggled goods, civil forfeiture will be the better way to go. —*SDC*

Preliminary Order of Forfeiture / Ancillary Proceeding

- **The Ninth Circuit holds that a preliminary order of forfeiture is final and appealable as to the defendant, even though the ancillary proceeding is not complete.**

- **Defendant who has not been appointed guardian of his minor child as a matter of state law lacks standing to file a claim in the ancillary proceeding on behalf of the child.**

Defendant was convicted of a RICO offense; he was sentenced and he appealed. Part of the sentence was a preliminary order of forfeiture, forfeiting Defendant's interest in an IRA account. Defendant, however, did not appeal the forfeiture order, but instead filed a claim in the ancillary proceeding on behalf of his minor child who was named as beneficiary on the IRA account.

The Government objected that the district court lacked jurisdiction to entertain any objection to the forfeiture from Defendant once the preliminary order was entered. It also argued that Defendant lacked standing to file a claim in the ancillary proceeding on behalf of his minor child. The **Ninth Circuit** agreed with the Government on both points.

A preliminary order of forfeiture, the court held, is final as to the defendant and must be appealed, even if it is not yet final as to third parties. Therefore, a defendant must appeal the forfeiture order at the time he appeals his sentence and conviction, even if the ancillary proceeding is not complete.

To the extent that Defendant's motion in the ancillary proceeding was made on behalf of his minor child, the court ruled that because Defendant was not the custodial parent and had never been appointed legal guardian for the child under state law, he lacked standing to challenge the forfeiture in the ancillary proceeding in a representative capacity. —*SDC*

United States v. Bennett, ___ F.3d ___, No. 97-30255, 1998 WL 309269 (9th Cir. June 12, 1998). Contact: AUSA Peter Mueller, AWAW01(pmueller).

Comment: The court in this case followed two other appellate decisions holding that the preliminary order of forfeiture is final as to the defendant and must be appealed irrespective of the status of the ancillary proceeding. *See United States v. Chistunas*, 126 F.3d 765 (6th Cir. 1997); *United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994), *aff'd*, 516 U.S. 29 (1995). No court has ruled, however, on a related issued that has recently been raised. Under Fed. R. Crim. P. 32(d)(2), a court may enter a preliminary order of forfeiture before the defendant is sentenced. The Rule was so amended in 1996 to permit an earlier start to the ancillary proceeding. The question that arises, however, is: Does the defendant have to appeal the preliminary order of forfeiture within 30 days of when it is entered even if he hasn't yet been sentenced? Or does the appeal time not begin to run on the preliminary order until the sentencing date?

Our view is that the preliminary order becomes final as to the defendant at the time of sentencing. *See* Rule 32(d)(2) ("At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment."). Therefore, the defendant is probably not obligated to appeal the preliminary order until sentencing takes place. —*SDC*

Pretrial Restraining Order / Third-party Rights

- **Third parties may not file separate lawsuits against the United States to challenge pretrial orders restraining the property in a criminal case.**

- **Third party's remedy is to challenge the restraining order in the criminal case or to wait until the ancillary proceeding.**

A third party with a claimed interest in real property that was subject to a pretrial restraining order in a criminal case filed a separate civil lawsuit against the United States, alleging that the restraining order violated the "takings clause" of the Fifth Amendment. The **Eleventh Circuit** held that the civil case violated 21 U.S.C. § 853(k)(2) and should be dismissed.

Section 853(k)(2) provides that a third party may not "commence an action at law or equity against the United States concerning the validity of his alleged interest" in property subject to criminal forfeiture. The purpose of the statute is to make the ancillary proceeding described in section 853(n) the sole means for resolving third-party claims to forfeited property.

The third party argued, however, that section 853(k)(2) was unconstitutional as applied to the facts of this case. Because the criminal defendant was a fugitive who may never be brought to justice, she asserted, she might never be able to vindicate her right to the property in the post-trial ancillary proceeding. Be that as it may, the court held that the third party's remedy was to seek to have the restraining order modified or vacated by the court that issued it and to take an interlocutory appeal if that motion is denied.

In challenging the restraining order, the court noted, the third party could not ask the criminal court to entertain challenges to the underlying criminal indictment. The court did not, however, express any view on what issues the third party would be entitled to raise. —*SDC*

Roberts v. United States, 141 F.3d 1468 (11th Cir. 1998). Contact: AUSA Peggy Ronca, AFLMJ01(pronca).

Comment: The courts uniformly hold that section 853(k) bars third parties from trying to circumvent the ancillary proceeding statute by seeking an earlier resolution of their claims to the property subject to forfeiture in a criminal case. The issue has arisen in a wide variety of contexts. *See United States v. Patel*, 1996 WL 166949 (N.D. Ill. 1996) (unpublished) (third parties may not institute administrative actions for the return of cash and vehicles seized for criminal forfeiture; they must await the ancillary proceeding); *United States v. Brandino*, No. 95-626-CR-RYSKAMP (S.D. Fla. June 27, 1997) (unpublished) (third party cannot seek division of restrained assets prior to the ancillary proceeding); *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (third party may not seek dismissal of forfeiture count before order of forfeiture is entered); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); *United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (third party may not move to dismiss order of forfeiture; must file petition in ancillary proceeding); *United States v. Duboc (Petition of F. Lee Bailey)*, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (third party may not move to quash preliminary order of forfeiture); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Oppenheimer & Co.)*, 1992 WL 212324 (D.D.C. 1992) (third party may not file interpleader action when ordered to surrender forfeited funds to the marshal); *In Re: Smouha*, 136 B.R. 921, 926 (1992) (third party may not attempt to assert interest in defendant's forfeitable assets by initiating action in bankruptcy court); *United States v. Security Marine Credit Corporation*, 767 F. Supp.

60 (S.D. Fla. 1991) (section 853(k) bars a third party from filing private civil foreclosure action to recover interest in forfeited boat).

The courts also uniformly hold, however, that there is an exception to this rule allowing third parties to challenge pretrial restraining orders that affect their property interests. The rationale is that, if the third party is suffering an immediate and irreparable harm to his or her property interests, fairness dictates that the third party be able to seek relief from the restraining order now and not have to wait until the ancillary proceeding to do so. *See United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (third party may participate in the restraining order proceeding); *United States v. Wu*, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing third party to contest restraining order); *United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name); *United States v. Siegal*, 974 F. Supp. 55 (D. Mass. 1997) (defendant's family members entitled to timely hearing on restraining order where criminal trial would not commence for another six months). *Note*: Not all courts require the injury to be immediate and irreparable.

What is not so clear is the basis on which the third party can challenge the pretrial restraining order. That a court in a criminal case may enter an order restraining property held by third parties is well-established. *See United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992); *In Re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988); *see also United States v. BCCI Holdings (Luxembourg), S.A. (Application of Clifford and Altman)*, 980 F. Supp. 496 (D.D.C. 1997) (pursuant to section 1963(e), court may appoint trustee to liquidate assets of corporation where such liquidation is necessary for the Government to realize defendant's 61 percent interest). Such restraints are justified where necessary to preserve the Government's interest in the property to be forfeited by the defendant once he is convicted.

It is also well-established—except in the Second Circuit—that the court may not be asked to question the validity of the grand jury's finding of probable cause to support the criminal charges in the underlying indictment. *See Real Property in Waterboro, supra* (third party may not challenge the validity of the indictment or raise overarching issues of superior ownership claims raised in the ancillary proceeding, but claimant may raise prudential arguments concerning the burdens of restraint pretrial).

This leaves rather little for a third party to raise in opposition to a pretrial order restraining his or her property. The view of the Department of Justice is that the third party may properly seek to have the restraining order modified or vacated on the ground that there is insufficient evidence of the nexus between the property and the offense to establish probable cause to believe that the restrained property is subject to forfeiture, or that the restraint causes a substantial hardship to the moving party and less intrusive means exist to preserve the subject property for forfeiture. *See* Department of Justice comments on pending forfeiture legislation, H.R. 1965, 105th Cong., 2d Sess. (1998).

Ancillary Proceeding / Relation Back Doctrine / Bona Fide Purchaser

- **Hospital that provided medical services to the defendant was only a general unsecured creditor, and not a bona fide purchaser of any interest in the defendant's forfeited property.**
- **The Government's interest in property forfeited in connection with a drug conspiracy vests at the time the conspiracy commences.**
- **Creditor who obtains a judgment lien on defendant's property has no legal interest in the property until he**

levies against the property, and even then cannot defeat the Government's interest unless he levies before the Government's interest vests under the relation back doctrine.

Defendant was convicted of a drug trafficking conspiracy and ordered to forfeit certain real property. A hospital that had treated Defendant had obtained a money judgment against her and filed the judgment as a lien against the real property. Accordingly, in the ancillary proceeding, the hospital filed a petition under section 853(n)(6)(A) and (B) alleging that it had a superior interest in the property and that it was a "bona fide purchaser for value" who acquired the property without reason to know that it was subject to forfeiture. The district court rejected the hospital's claim on both grounds.

The court began with the bona fide purchaser claim under paragraph (6)(B). The hospital argued that it had provided value to Defendant by providing medical services. The court acknowledged that the provision of services may constitute "value," but it held that the hospital nevertheless had not "purchased" Defendant's land. When the hospital provided services to Defendant, it became a general unsecured creditor, but not a purchaser. Therefore, the hospital's claim under paragraph (6)(B) failed.

The only other way for the hospital to recover was by establishing that, pursuant to paragraph (6)(A), it held a superior interest in the real property at the time the offense giving rise to the forfeiture took place. That paragraph embodies the relation back doctrine, which says that the Government's interest in the property subject to forfeiture vests at the time of the underlying criminal offense. The offense in this case was a conspiracy that began in 1981. Therefore, the hospital's burden was to show that it had a vested interest in the property at that time that was superior to Defendant's interest.

This the hospital could not do. First, while the hospital had obtained a money judgment against Defendant and had filed the judgment as a lien against the real property, it had never levied against the property. Under state law, a judgment creditor has no interest in the debtor's property until he levies against it. Because the hospital never levied against Defendant's property, it possessed, at most, inchoate rights to the property, not a superior, vested interest as required by paragraph (6)(A).

Moreover, even if the hospital had levied against the property, its rights, under state law, would have related back only to the time that it filed the judgment lien. That was in 1993. Because the Government's interested vested in 1981 when the conspiracy began, the hospital would not have prevailed under paragraph (6)(A) even if it had levied against the property. —*SDC*

United States v. McClung, ___ F. Supp. ___, No. CRIM-A-97-0031-H, 1998 WL 275821 (W.D. Va. Apr. 27, 1998). Contact: AUSA Rusty Fitzgerald, AVAWCO(rfitzger).

Comment: The district court's ruling on the "B" claim is consistent with the majority rule but is nevertheless a pleasant surprise. The overwhelming majority of courts agree that a general unsecured creditor is not a "bona fide purchaser for value" of the property subject to forfeiture. Creditors generally can establish that they gave value to the defendant; that, after all, is how they came to be creditors. But in so doing they only acquired a cause of action against the defendant personally, not a legal interest in the defendant's property. *See United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988) (trade creditor is not a bona fide purchaser); *United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (same); *id. (Petitions of Trade Creditors)*, 838 F. Supp. 22, 28 (D.D.C. 1993) (same); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (general creditors are not bona fide purchasers); *United States v. Lavin*, 942 F.2d 177, 185-87 (3d Cir. 1991) (tort victims are not bona fide purchasers); *United*

States v. Ribadeneira, 105 F.3d 835 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is not a bona fide purchaser of any specific assets).

The only appellate court that disagrees with this rule is the Fourth Circuit, which holds that a general unsecured creditor is a bona fide purchaser for value within the meaning of paragraph (6)(B). *See United States v. Rockmeyer*, 836 F.2d 200 (4th Cir. 1987). Thus, it is welcome news that a district court in Virginia was able to follow the majority rule on this issue.

Cases applying the rule in paragraph (6)(A) to inchoate rights that were not exercised at the time the property became subject to forfeiture include the following: *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (bank that did not exercise right of setoff against defendant's assets until after property was subject to forfeiture could not prevail under section 1963(l)(6)(A), regardless of when order of forfeiture was issued); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1 (D.D.C. 1997) (holder of an option to buy defendant's property has no legal interest until the option is exercised). —*SDC*

Continuing Criminal Enterprise / Double Jeopardy

■ **The proceeds of a CCE offense necessarily include the proceeds of the lesser included drug offenses; therefore, it was proper for the district court to enter a money judgment based on the amounts involved in the underlying drug conspiracies.**

Defendant was convicted of two drug conspiracies and of conducting a continuing criminal enterprise (CCE). Following the entry of the jury verdict, the district court dismissed the two conspiracy convictions as lesser included offenses. *See Rutledge v. United States*, 517 U.S. 292 (1996) (conspiracy to distribute is a lesser included offense of a CCE offense). But the court nevertheless entered an order of forfeiture under 21 U.S.C. § 853 that was based on both the CCE offense and the lesser-included conspiracies. The order consisted of a money judgment for $350 million and an order to forfeit substitute assets up to that amount.

Defendant claimed that the forfeiture order violated the Double Jeopardy Clause because it punished him twice for the same offense. The **Fifth Circuit** disagreed.

To the extent that the two drug conspiracies were lesser-included offenses, the court held, the proceeds of the conspiracies were necessarily proceeds of the CCE. Section 853, therefore, required Defendant to forfeit the same amount whether the court based the money judgment on the convictions for all three counts or only on the CCE conviction. Accordingly, there was no multiple punishment and no violation of the Double Jeopardy Clause. —*SDC*

United States v. Abrego, 141 F.3d 142 (5th Cir. 1998). Contact: AUSA Susan B. Kemper, ATXS02(skemper).

Comment: For those interested in money laundering law, this case contains an excellent discussion of several important issues including the following: (1) Does the transfer of cash from one person to another constitute a financial transaction? (yes); (2) Does the transportation of cash to, but not across, the U.S.-Mexico border constitute a violation of section 1956(a)(2)? (yes); (3) Do the higher penalties for money laundering conspiracies under section 1956(h) apply to conspiracies that "straddle" the effective date of the statute? (yes); and (4) Does section 1956(h) require proof of overt acts? (maybe). —*SDC*

Comity / Foreclosure

- **Plaintiff whose property was the subject of a state tax foreclosure had no standing to object to the foreclosure on the ground that the property was the subject of a pending federal forfeiture action.**

- **The rule of comity that prevents the court of one sovereign from exercising jurisdiction over property that is already within the jurisdiction of another sovereign was not created for the benefit of the property owner, and it does not give the plaintiff a reason to object to the exercise of one sovereign's jurisdiction.**

The United States instituted a civil forfeiture action against plaintiff's house based on its use in plaintiff's narcotics trade. Ultimately, the district court dismissed the forfeiture action on the ground that forfeiture of the house would have been an excessive fine in violation of the Eighth Amendment. While the forfeiture action was pending, however, the local taxing authority commenced an *in rem* tax foreclosure action against the house in state court and obtained title.

Plaintiff brought suit in federal court against the local taxing authority, arguing that he was deprived of his property without due process of law when the state court conveyed title to his house to the city. Plaintiff relied on a long line of cases holding that whichever court—federal or state—is the first to exercise jurisdiction over property retains jurisdiction to the exclusion of any other court. Thus, he argued that, because the property was subject first to the jurisdiction of the federal court in the forfeiture action, the state court lacked the authority to convey it to the local taxing authority in the tax foreclosure action.

The district court granted the city's motion for summary judgment on the ground that comity, not due process, created the rule against two sovereigns simultaneously asserting jurisdiction over the same parcel of realty. It held that even if comity had been violated, plaintiff would have no standing to protest. And even if he had standing to protest, his protestations should have been addressed to the state court in the foreclosure action. —*BB*

Habiniak v. Rensselaer City Municipal Corp., ___ F. Supp. ___, No. 95-CV-1602, 1998 WL 261554 (N.D.N.Y. May 15, 1998).

Standing / Statute of Limitations / Interest / Attorneys' Fees

- **Naked possession of seized property is not sufficient to establish standing, but the Government's own pleadings may provide a sufficient explanation of the claimant's relationship to the property by describing the claimant's role in the scheme.**

- **If the Government is aware of an ongoing scheme, the statute of limitations runs from the time the Government first became aware of the scheme, not from the date of the particular violation that generated the seized property.**

- **The Sixth Circuit adopts the Ninth Circuit rule on pre-judgment interest. To the extent that seized money actually has earned interest, or has provided an indirect financial benefit to the Government by reducing its borrowing, the**

Government must return such actual or constructive interest to successful claimants along with the *res*.

- **Pre-judgment interest, however, is not assessed for the period when the Government held the property as evidence.**

- **Even though the Government ultimately may have been found incorrect, claimants are not entitled to award of attorneys' fees under the Equal Access to Justice Act or Fed. R. Civ. P. 11, where the Government's position was substantially justified and reasonable under the circumstances.**

In October 1989, as part of an ongoing gambling investigation that began a year earlier, federal agents executed a search warrant at the residence of one of the investigation's targets, a bingo game operator. The agents seized a large sum of U.S. currency from the game operator's residence. The game operator subsequently was convicted of conducting an illegal gambling business.

In March 1994 the Government initiated a civil forfeiture action under 18 U.S.C. §1955(d) against the money used in the illegal gambling business. By this time, more than five years had passed since the Government became aware of the gambling operation, but less than five years had passed since the date of the seizure. There were two claimants: a charitable organization for which the game operator conducted allegedly legitimate bingo games, and a bingo game "caller" who, at the time of the seizure, had worked for and lived at the residence of the bingo game operator. Most of the seized money was found in the caller's bedroom at the game operator's residence.

The claimants asserted that the statute of limitations (19 U.S.C. §1621) barred the forfeiture action. The district court agreed and dismissed the action because it found that the Government had discovered the underlying gambling offenses by September 1988 and that the five-year limitations period had therefore expired before the forfeiture action was initiated in March 1994. The district court also granted the claimants' motion for pre-judgment interest on the seized money to be returned to the claimants, but it denied their motion for attorneys' fees. The district court denied the Government's motion to dismiss both claims for lack of standing. The parties appealed and cross-appealed, and the district court stayed return of the money pending the outcome.

On the standing issue, the **Sixth Circuit** acknowledged that naked possession of currency is insufficient to establish standing and that there must be some indication that the claimant is not a simple and perhaps unknowing custodian. "The assertion of simple physical possession of property as a basis for standing must be accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property." That test was satisfied here because the allegations in the Government's own complaint set forth the relationship of the claimants to the property.

With respect to the charitable organization, the complaint stated that the convicted bingo operator conducted illegal bingo games on behalf of the claimant, transferred the cash receipts from the bingo games to her home (the location of the seized currency), and forwarded the cash to the claimant after deducting her expenditures. The panel concluded that, although the claimant charity did not provide evidence of its ownership interest, its claim of ownership, together with the Government's own allegations of the claimant's relationship to the property, were enough to establish standing.

Pertaining to the claimant bingo "caller," the Government's complaint for forfeiture alleged that almost all of the seized money had been found in his bedroom. The panel found that the constructive possession of the currency in "his own bedroom" was sufficient to give him standing. There was more than a

naked possession claim because, again, the allegations in the complaint setting forth the claimant's role in the offense provided "a good sense of the currency's provenance and [the claimant's] connection to it."

Concerning the statute of limitations under 19 U.S.C. § 1621, the Government argued that there was a continuing violation of the gambling laws and that the seized currency was from relatively recent bingo operations within the five-year limitations period. The **Sixth Circuit** disagreed. It noted that the statute of limitations is enforced according to a "known or should have known" standard under which an offense is "discovered" when the Government discovers or possesses the means to discover the alleged wrong, whichever occurs first. Based on its review of the record, the panel found that the district court committed no clear error in determining that the Government "discovered" the gambling offenses in September 1988, at the latest, so that the statute of limitations expired in the fall of 1993, before the March 1994 forfeiture action. The panel pointed out that the statute of limitations does not run from the date of a particular violation, but from the date of the "discovery" of an offense. Consequently, despite the continuing nature of the gambling offenses, the Government could not disregard its "discovery" of earlier occurring gambling violations in preference for particular later violations that occurred within the limitations period.

The Government contended that the district court's award of pre-judgment interest on the seized cash to be returned to the claimants was erroneous because the Government never waived its sovereign immunity against the assessment of such interest. The **Sixth Circuit** affirmed the district court's reliance on *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir 1995), which held that sovereign immunity does not apply to pre-judgment interest on seized money being returned to a claimant because the amount of actual interest earned or constructive interest (*i.e.*, financial benefit from reduced borrowing needs) realized from the seized cash is not the Government's money but is part of the seized *res* to be returned to the claimants as property that has not been forfeited to the Government. Consistent with this ruling, the panel also ruled that, on remand to the district court, the pre-judgment interest should be calculated excluding the period during which the seized money was being held as evidence against the bingo game operator and was not on deposit with the U.S. Treasury.

Finally, the court affirmed the district court's denial of attorneys' fees because the Government's position was "substantially justified" in accordance with the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), and because the Government's position had a basis in law and fact and was reasonable under the circumstances for purposes of Fed. R. Civ. P. 11 sanctions. The fact that the Government was ultimately incorrect and did not prevail in the forfeiture action does not necessarily lead to an award of attorneys' fees. Having reviewed the Government's legal arguments and the factual basis of the Government's case, the panel found no indication that the district court abused its discretion in denying claimants attorneys' fees. —*JHP*

United States v. $515,060.42 in U.S. Currency, ___ F.3d ___, Nos. 95-6579, 96-6057, 96-6175, and 97-5016, 1998 WL 260294 (6th Cir. May 26, 1998). Contact: AUSA Robert E. Simpson, ATNE01(rsimpson).

Comment: The court's ruling on the statute of limitations issue is disturbing. It suggests that in cases involving an ongoing conspiracy, all proceeds of the conspiracy must be forfeited within five years of the date that the Government first became aware of the conspiracy. For example, if the Government becomes aware of a drug conspiracy in 1993, all drug proceeds obtained by the conspiracy would have to be forfeited by 1998, including proceeds not earned until that year. Indeed, if the conspiracy continues until 1999, it would be impossible to forfeit any proceeds because the statute of limitations would have expired before the crime giving rise to the forfeiture even occurred. —*SDC*

Standing / Admiralty Rules

- **Naked claim of possession is not sufficient to establish standing to contest forfeiture.**

- **Claimant's failure to file timely claim and answer in accordance with Rule C(6) of the Admiralty Rules warrants dismissal of his claim.**

The claimant was a suspected drug money launderer who was under surveillance by local law enforcement officers and was observed by them operating his car in an unusual and evasive manner, parking the car, switching to another car, driving away, and returning to the first car on foot minutes later carrying a large canvas knapsack on his back. When the officers approached him, identified themselves, and questioned him, Claimant slipped the knapsack off, denied any and all knowledge of it, and stated that he did not know how it had come to be on his back. He stated that the knapsack was not his and that the officers could look inside it.

Upon opening the knapsack, the officers discovered that it contained over $180,000. When questioned about the money, Claimant still denied any and all knowledge of the currency and the knapsack. Whereupon, the agents seized the knapsack and the currency from the claimant, issued him a receipt, and submitted the currency to the FBI for administrative forfeiture. The claimant submitted a claim and cost bond, and the case was referred to the U.S. Attorney's Office, which filed a complaint for forfeiture of the currency under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The claimant then submitted a claim in the judicial forfeiture action, and the Government moved to dismiss his claim for lack of standing. The district court agreed.

The court pointed out that, before a claimant can contest a forfeiture, he must demonstrate that he has standing to do so, and a naked claim of possession is not sufficient to confer standing. *Mercado v. U.S. Customs Service*, 873 F.2d 641, 644-45 (2d Cir. 1989). There must be some indication that the claimant is in fact a possessor, not a simple, perhaps unknowing custodian. Some indicia of reliability or substance to reduce the likelihood of a false or frivolous claim is necessary. *Id.* The court found that the claimant had utterly failed to set forth any reliable objective indicia of his lawful possession of the property and had based his claim solely on his conclusory assertion, set forth in his notice of claim, that he is the lawful possessor of the property. The district court stated that, as in *Mercado*, such a conclusory assertion following suspicious circumstances accompanying the seizure and initial denials of any knowledge of the property is insufficient to confer standing.

The court also found that the claimant had failed to comply with the requirements of Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims concerning the times within which claims and answers must be filed. The court ruled that such failure provided additional grounds for dismissal of the claim. —*JHP*

United States v. $182,980.00 in U.S. Currency, No. 97-CIV-8166(DLC), 1998 WL 307059 (S.D.N.Y. June 11, 1998) (unpublished). Contact:AUSA Alexander Shapiro, ANYZ11(zshapiro).

Standing

- **A nominee title holder has no Article III standing to contest the civil forfeiture of property.**

The Government filed a civil forfeiture action, pursuant to section 881(a)(7), against real property used to facilitate drug trafficking. Claimant filed an innocent owner claim, alleging that she received title

to the property through a quit claim deed from her cousin. Claimant never resided on the premises, however; it was occupied by her brother who was involved in significant drug trafficking while living there.

In the civil forfeiture action, Claimant made the following concessions in her deposition: her cousin provided no reason for giving her the house as a gift; she did not know the value of the property; she never paid taxes on the property nor reported it as income in her federal tax return; she never charged rent from her brother or from later "tenants"; and she made no repairs and never purchased insurance. Claimant also declared in somewhat conflicting testimony that she originally intended to rent the house, but had never done so because she contemplated moving into the premises herself. Last, Claimant declared at the time of the deposition that she was completely unaware of her brother's drug activities, despite the fact that she had attended his criminal trial.

The district court granted summary judgment to the Government, holding that claimant was willfully blind to the illegal activities and therefore was not an innocent owner. Claimant appealed on the grounds that a genuine issue of material fact existed.

The **Sixth Circuit** held that the claimant lacked standing to contest the forfeiture. While upholding the summary judgment in favor or the Government, the court did so not based upon a showing of willful blindness, but rather based upon a finding that the Government had presented undisputed evidence as a result of the deposition testimony that the claimant was merely a nominee title holder. As standing is a prerequisite to a forfeiture challenge, the government need never have responded to the innocent owner defense. —*WJS*

United States v. Certain Real Property Located at 16397 Harden Circle, No. 95-2387 (6th Cir. May 7, 1998) (unpublished). Contact: AUSA Bonita Reid Gardner, AMEIE02(bgardner).

Notice / Administrative Forfeiture / Fourth Amendment / Eighth Amendment

- **Administrative forfeitures cannot be challenged in district court under any legal theory—including Fourth and Eighth Amendment claims—that could have been raised by contesting the administrative proceedings.**

- **The Drug Enforcement Administration's (DEA's) attempt to provide notice to the same person of two administrative forfeitures was adequate, even though one notice was successfully delivered and the other was returned undelivered.**

DEA agents seized two sums of money from Plaintiff as he waited at an airport to board a flight. DEA published notices for two administrative forfeiture proceedings, and sent certified mail notices for both sums to Plaintiff, but received a signed receipt for only one of the two notices. The other notice was returned to DEA unclaimed. Plaintiff's attorney filed an untimely claim and cost bond to contest the forfeiture of the first sum, but DEA returned it as untimely. Plaintiff never contested the forfeiture of the second sum. Consequently, DEA forfeited both sums administratively.

Plaintiff eventually filed a civil suit seeking return of the forfeited money, damages for alleged violation of his Fourth Amendment rights by the seizures of his money without probable cause at the airport, and damages for the "cruel and unusual punishment" of the seizures.

The court dismissed the plaintiff's claim for return of the seized money because it lacked subject matter

jurisdiction. The court concluded that it had been divested of jurisdiction over the forfeiture of the money by DEA's initiation of administrative forfeiture proceedings and by the plaintiff's failure to contest such proceedings by timely filing claims and cost bonds. The court ruled that, if no claim and bond are filed, the court does not obtain subject matter jurisdiction, and that a forfeiture cannot be challenged in district court under any legal theory that could have been raised in contesting an administrative proceeding but was not, *see Linarez v. U.S. Department of Justice*, 2 F.3d 208, 212-13 (7th Cir. 1993).

The court acknowledged that it could exercise equitable jurisdiction over an administrative forfeiture where notice was inadequate. However, the court found that DEA made a reasonable effort to provide plaintiff with actual notice of both seizures. Based on this finding, the court declined to exercise its equitable jurisdiction despite the absence of a signed receipt for one of the two personal notices that DEA mailed to the plaintiff.

Again relying on *Linarez*, the court ruled that it lacked subject matter jurisdiction for plaintiff's Fourth Amendment claim because the plaintiff could have raised his claim of lack of probable cause for the seizure by filing a claim and bond to contest the forfeiture but did not do so. The court also dismissed the plaintiff's claim that the seizures constituted cruel and unusual punishment in violation of the Eighth Amendment. The court ruled that such claims can arise only after a formal adjudication of guilt. Because there had been no formal adjudication of the plaintiff's guilt at the time of the seizures, the plaintiff's Eighth Amendment claim could not stand. —*JHP*

Correa-Serge v. Eliopoulas, No. 95-C-7085, 1998 WL 292425 (N.D. Ill. May 19, 1998) (unpublished). Contact: AUSA Christopher Tracy, AILN02(ctracy).

Comment: The district court's holding that the courts lack subject matter jurisdiction to consider claims that could have been raised if the plaintiff had filed a claim and cost bond is in contrast with the Ninth Circuit's ruling last year in *Gete v. Immigration and Naturalization Service*, 121 F.3d 1285 (9th Cir. 1997) (summarized in the September 1997 edition of the *Quick Release*). In *Gete*, the Ninth Circuit ruled that, for purposes of a class action suit against the Immigration and Naturalization Service (INS) and one of its regional commissioners, the plaintiffs' failure to file claims and cost bonds to contest the forfeiture of their vehicles by INS did not foreclose their claims that INS violated their Fourth, Fifth and Eighth Amendment rights in the conduct of the seizures and administrative forfeitures. The Ninth Circuit based its ruling on its conclusion that the plaintiffs were not seeking judicial review of the particular administrative forfeiture decisions on the merits, but were challenging the constitutionality of INS's administrative forfeiture process generally. —*JHP*

Section 1983 / Administrative Forfeiture / Notice

■ **Jail official who fails to deliver notice of an administrative forfeiture to a prisoner is not liable for the loss of the prisoner's property, if the prisoner would not have prevailed against the forfeiture action even if he had received timely notice.**

Plaintiff sued a local jail official under 42 U.S.C. § 1983, alleging that the jailer's failure to deliver notice of an administrative forfeiture that was mailed to him when he was an inmate at the jail, caused Plaintiff to lose his property. When the jailer did not respond to the complaint, Plaintiff asked for a default judgment. The court denied the motion.

Given Plaintiff's own culpable conduct, the court held, there was a substantial question as to whether Plaintiff could have succeeded in preventing the forfeiture even if he had received timely notice. Thus, the jailer's failure to deliver the notice may not have

been the proximate cause of Plaintiff's loss. For that reason, entry of a default judgment against the jailer would not be appropriate. —*SDC*

Triestman v. Albany County Municipality, No. 93-CV-1397, 1998 WL 238718 (N.D.N.Y. May 1, 1998) (unpublished).

Section 1983

- **A city is entitled to summary judgment in a civil rights action where the only allegation is that a police officer planted narcotics in stopped vehicles to make the drivers prosecutable and the cars forfeitable, and where there was no evidence that the city had a policy of failing to train or supervise its officers properly.**

Plaintiff filed a civil rights action under 42 U.S.C. §1983 against units of local government and their law enforcement personnel. Plaintiff alleged that the city failed to properly train and supervise its chief of police and Officer Cole with the result that they routinely stopped blacks driving nice cars and planted drugs in them in order to make the occupants prosecutable and the cars forfeitable. The only hard evidence the plaintiff proffered was plaintiff's statement that Officer Cole planted narcotics in plaintiff's car, which resulted in the institution of forfeiture proceedings. There was also an internal law enforcement report stating:

> that Cole twice planted cocaine on criminal suspects after their arrests in 1990 and 1991 in order to confiscate cash and a Corvette automobile; Cole made trips to Las Vegas after large cash busts; and Cole had recently purchased a Porsche car.

The district court explained that where a municipality's policies are attacked as unconstitutional, and they are not facially unconstitutional, the plaintiff must show that the municipality had a policy or custom which was the moving force behind the alleged deprivation of plaintiff's civil rights. A municipality may be held liable for failing to properly train or supervise its employees, but "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." (Citation omitted.) A plaintiff must also show: (1) there must be recurring situations presenting an obvious potential for the constitutional violation at issue; (2) the violation must be a plainly obvious or highly predictable consequence of the failure to train or supervise.

The court then pointed out that the city had given evidence of its proper training of its employees. It concluded that, because Plaintiff's suit was based only on the city's failure to train and supervise its employees properly and not on any allegation that the city intentionally targeted minorities, and, because the internal police report did not indicate that the city had a policy of inadequate training or supervision as distinguished from character flaws in a couple of officers, it was entitled to summary judgment. —*BB*

Jacobs v. City of Port Neches, ___ F. Supp. ___, No. 1:94-CV-767, 1998 WL 317808 (E.D. Tex. June 4, 1998).

Interlocutory Sale

- **When a civil forfeiture proceeding is stayed, the United States can conduct an interlocutory sale of a vehicle under Supplemental Rule E(9)(b) to protect its value, even if the claimant objects.**

- **Claimant's Fifth Amendment rights are not jeopardized by an interlocutory sale because it is not a final resolution of the merits of the forfeiture proceeding.**

■ **A lengthy delay in seeking permission to conduct an interlocutory sale does not estop the Government from making the request.**

Claimant's vehicle was seized in 1992 by the local sheriff's department. Two years later, Claimant was charged in a federal indictment with drug trafficking crimes, and the Drug Enforcement Administration (DEA) seized the vehicle for forfeiture under federal law. When the civil forfeiture action was stayed until the resolution of the criminal case, the vehicle began to diminish in value and to run up substantial storage and maintenance costs. After enduring these costs for several years, the United States filed a motion for an interlocutory sale of the vehicle to prevent further dissipation of its value.

In granting the Government's motion for an interlocutory sale, the court turned to the Admiralty Rules and 21 U.S.C. § 881(b). The court noted that the Rules permit the court to order the interlocutory sale of seized property if any of the factors set forth in Rule E(9)(b) exists: (1) the defendant item is perishable or liable to deterioration, decay, or injury by virtue of its custodial detention pending resolution of the stayed forfeiture proceeding; (2) the expense of keeping the item is disproportionate to the value thereof; or (3) there is unreasonable delay in securing the release of the property.

Using this guideline, the court held the United States established through expert opinion that the defendant's vehicle was depreciating in value and continuing to accrue storage and maintenance costs at an annual rate of approximately 10 percent of its sale price which necessitated the interlocutory sale to prevent further depreciation. The court rejected the claimant's argument that the uniqueness of the defendant's vehicle prevented an interlocutory sale, and the court stated that the claimant had not presented anything to negate the Government's expert's opinion that the value of the vehicle was diminishing.

Next, the court rejected the claimant's argument that his Fifth Amendment rights with regard to the related criminal action pending against him would be violated by the interlocutory sale court proceeding. The court noted that a motion for an interlocutory sale is not a final resolution of the merits of the forfeiture proceeding; instead, the purpose of an interlocutory sale is to preserve the value of the property subject to forfeiture proceeding when the value of such property is diminishing. To protect the claimant's Fifth Amendment rights, the court, in making its determination on the motion for interlocutory sale, would not consider any evidence pertaining to the claimant's involvement in the underlying crimes.

Finally, the court rejected the claimant's argument that the Government's delay in seeking interlocutory sale—the vehicle had been in the custody of state or federal authorities since 1992—somehow precluded such sale. The court noted that the Federal Government was without jurisdiction over the defendant vehicle until it was seized by the DEA in 1996 and was not free to pursue the civil forfeiture proceeding until the local prosecutor's office discontinued its prior state forfeiture proceeding.

—*HSL*

United States v. One 1991 Acura NSX, No. 96-CV-511S(F) (W.D.N.Y. June 3, 1998) (unpublished). Contact: AUSA Richard D. Kaufman, ANYW01(rkaufman).

Criminal Forfeiture / Rule 32.2

■ **Standing Committee on changes to the Federal Rules rejects new comprehensive Rule governing criminal forfeitures.**

The Standing Committee on Rules of Practice and Procedure—the panel of judges, attorneys and academics that proposes changes to the Federal Rules to the Judicial Conference—met on June 18,

1998, in Santa Fe, New Mexico, to consider a long list of proposed changes to the civil, criminal, evidence and bankruptcy rules. Of particular interest to the forfeiture community, the Committee considered the Justice Department's proposal to add new Rule 32.2 to the Federal Rules of Criminal Procedure.

Rule 32.2 would have created, for the first time, a comprehensive set of procedures governing criminal forfeiture cases. *See Asset Forfeiture News* (May/June 1998): 13. The most controversial aspect of the new Rule would have abolished the jury's role in determining whether property should be forfeited following a conviction in a criminal case. Instead, criminal forfeiture would be treated as part of sentencing, in accordance with the Supreme Court's decision in *Libretti v. United States*. The Rule also would have established procedures governing third-party rights in criminal forfeiture cases and procedures for forfeiting newly discovered assets and substitute property. The Rule was approved by the Advisory Committee on Criminal Rules in April 1998, after two years of debate and consideration.

The Standing Committee rejected the new Rule by a vote of 4-7. It did not give a reason for rejecting the Rule, but it appeared that the majority was uncomfortable supporting such a comprehensive change in an area of the law with which most members of the Committee were unfamiliar. It is now up to the Department to decide whether to recommend a scaled-down version of the Rule to the Advisory Committee when it meets in October. Another alternative is to see whether Congress might enact the new Rule itself as part of a criminal forfeiture reform bill that is now pending in the House of Representatives.

For more information contact: AFMLS Assistant Chief Stef Cassella, CRM20(scassell).

Quick Notes

■ Tax Liability for Forfeited Assets

The U.S. Tax Court holds that a taxpayer's forfeiture of seized currency does not prevent the money from being included in the taxpayer's gross income for tax purposes.

Arcia v. Commissioner of Internal Revenue, T.C. Memo 1998-178, 1998 WL 237782 (U.S. Tax Court May 13, 1998). Contact: Attorney Reginal R. Corlew, Internal Revenue Service, (305) 982-5325.

■ Money Laundering / Fungible Property

Once the Government has established probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under 18 U.S.C. § 984. The court notes that it is not necessary for the complaint to refer specifically to section 984 for that statute to apply.

United States v. United States Currency Deposited in Account No. 1115000763247, No. 97-C-1765, 1998 WL 299420 (N.D. Ill. May 21, 1998) (unpublished). Contact: AUSA Tony Masciopinto, AILN02(amasciop).

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